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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SCOTT P. FAGG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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June 1992

QUESTION PRESENTED

Whether the Court of Military Appeals erred in concluding that *Bowers v. Hardwick*, 478 U.S. 186 (1986) precluded judicial scrutiny and constitutional invalidation of the proscription against sodomy found in Article 125(a), Uniform Code of Military Justice (UCMJ), as applied to petitioner's private, heterosexual, noncommercial, consensual, adult oral sex.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Scott P. Fagg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on March 24, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 34 M.J. 179 (C.M.A. 1992) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on 6 August 1991, is reported at 33 M.J. 618 (A.F.C.M.R.) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Review was entered on 14 April 1992. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867 (a) (Supp. 1992).

CONSTITUTIONAL AND RULE FOR COURTS-MARTIAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment of the Constitution of the United States provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

10 U.S.C. § 925(a), Art. 120(a), Uniform Code of Military Justice provides:

> Section 925. Art. 125. Sodomy
>
> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

On December 12, 1990 the petitioner, an eighteen-year old Air Force airman (E-2), was tried by a general court-martial composed of a military judge sitting alone at Altus AFB, Oklahoma. He pled guilty to, and was convicted of, carnal knowledge with a 14-year-old and consensual sodomy with a 16-year-old, violations of Articles 120(b) and 125(a) [10 U.S.C. §§ 920(b) and

925(a)] respectively.[1] He was sentenced to a bad conduct discharge, confinement for seven months, and reduction to airman basic (E-1).

During the guilty plea inquiry at trial, the defense and the prosecution entered into a stipulation of fact. It was agreed, with regard to the Article 125(a) sodomy charge, that the petitioner and his partner, April Coltman, engaged in mutual oral sex after Ms. Coltman turned 16 and during the course of a serious dating relationship where they saw each other almost every day. The trial court also received evidence that the petitioner and Ms. Coltman had talked of marriage and children.

The Air Force Court of Military Review reversed the petitioner's sodomy conviction and reassessed the sentence. The Court of Review held that there was a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults in the military when the acts were not outweighed by any compelling governmental interest. *United States v. Fagg*, 33 M.J. 618, 619 (A.F.C.M.R. 1991). In so finding, the Court noted that "military law has long recognized that the 'wholly private moral conduct of an individual' cannot be regulated." *Fagg*, 33 M.J. at 620 *citing United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952). The Court of Review made clear that "an individual's right to engage in certain sexual activities, however, is not without limits," and that "aggravating circumstances can provide the state with a compelling interest to justify a prosecution (*e.g.*, for adultery) where the underlying act is fornication." *Fagg*, 33 M.J. at 620. Similarly, the Court of Review observed that sodomy convictions under Article 125 have been sustained "where the government's interest in prosecuting is clear; for example: the acts were not private; the acts were nonconsensual; a minor was involved; the acts were incestuous; or duty relation-

[1] He pled not guilty to, and was acquitted of, additional charges of carnal knowledge and sodomy under Articles 120(b) and 125, UCMJ.

ships/need for military discipline were shown." *Id.* at 620, 621 (citations omitted).

In this case, the Court of Review observed that the petitioner's acts took place primarily in a private home outside of Altus Air Force Base, Oklahoma, and that Oklahoma courts have interpreted the Federal Constitution to convey a right of privacy that would preclude the petitioner's prosecution in State court. *Id.* at 621 *citing Hinkle v. State*, 771 P.2d 232, 233 (Okla. Crim. App. 1986); *Post v. State*, 715 P.2d 1105 (Okla Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986). The Air Force found that "the circumstances of this case failed to reflect a compelling governmental interest to justify intruding into [the petitioner's relationship with Ms. Coltman]. The private nature of the acts avoids any threat to public morality; indeed, no harm to anyone has been shown from the appellant's conduct." *Id.* The Court concluded that the constitutional right of privacy protected the petitioner's conduct from prosecution, and noted that facts presented by this case represented the most unaggravated Article 125 case reviewed by that Court, "[o]nly had the [petitioner] and his partner been married to each other would this case present less aggravation." *Id.* The Air Force Court, in so holding, made clear that their decision did not invalidate Article 125, but rather it limited the scope of its broad language with regard to private, heterosexual, noncommercial, consensual adult sex acts absent a compelling interest to regulate such conduct. *Id.*

The Court of Military Appeals reversed the decision of the Air Force Court of Military Review and reinstated the dismissed sodomy specification. The court did so by referencing its decision in *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992), decided the same day as the petitioner's case.[2] *United States v. Fagg*, 34 M.J. 179,

[2] In *Henderson*, the Court of Military Appeals affirmed an accused's conviction for private, noncommercial, consensual hetero-

180 (C.M.A. 1992). The Court of Military Appeals stated that although they "sympathiz[ed] with the [petitioner] regarding this particular conviction for what was unquestionably consensual conduct," the Court "[n]evertheless detect[ed] no indication from the Supreme Court which permit[ed] [them] to override the intent of Congress. *See Bowers v. Hardwick*, 478 U.S. 186 (1986)." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT OF MILITARY APPEALS ERRED IN RELYING ON *BOWERS v. HARDWICK*, 478 U.S. 186 (1986), AS THAT CASE IS INAPPOSITE TO THE CONSTITUTIONAL CLAIMS OF PETITIONER.

The Court of Military Appeals erred in concluding that *Bowers v. Hardwick*, 478 U.S. 186 (1986) precluded judicial scrutiny and invalidation of the proscription against sodomy in Article 125(a), UCMJ, as applied to petitioner's private, heterosexual, noncommercial, consensual, adult oral sex. This Court explicitly noted that its opinion regarding homosexual sodomy in *Bowers* express[ed] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy. *Bowers*, 478 U.S. at 187 n. 2. The issue before this Court in *Bowers* was Hardwick's suit challenging the statute as applied to homosexual sodomy, and thus "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . " *Id.* at 190. It was while resolving that issue that this Court discussed

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sexual fellatio. In so doing, the Court rejected the appellant's contention that his conduct was not proscribed by Article 125(a), holding that oral copulation has been "openly and expressly prohibited in the armed force of the United States since time immemorial." 34 M.J. at 176. Although the Court recognized that Massachusetts, where Henderson's act took place, like many other states, had decriminalized private, noncommercial, heterosexual, consensual fellatio among adults, the Court declined to follow suit with regard to Article 125(a), "absent authority from the Supreme Court." *Id.* at 178.

the "limits of the Court's role in carrying out its constitutional mandate." *Id.*

Although, like the Georgia sodomy statute, *Bowers*, 478 U.S. at 187 n. 1, Article 125(a) prohibits both homosexual and heterosexual sodomy, as well as sodomy occurring between married or single heterosexual couples, the issue presented by the petitioner's case with regard to Article 125(a) is, nevertheless, quite distinct than that addressed by the Court in *Bowers*, involving as it does heterosexual sodomy. The Court of Military Appeals, however, did not analyze whether the Air Force Court of Military Review erred as a matter of law when it narrowed the construction of Article 125's broad reach by finding that private, heterosexual, noncommercial, consensual, adult oral sex was constitutionally protected from prosecution absent a compelling government interest. Instead, the Court of Military Appeals merely expropriated the reasoning in *Bowers*, which declined to "extend a fundamental right [under the Due Process Clauses of the Fifth and Fourteenth Amendments] to homosexuals to engage in acts of consensual sodomy," *Bowers*, 478 U.S. at 191-92, in order to reverse the Court of Review. *Henderson*, 34 M.J. at 177-78, via reference in *Fagg*, 34 M.J. at 180. The Court of Military Appeals' reliance on *Bowers* is therefore fundamentally flawed, as *Bowers* was not binding and was irrelevant to this case of first impression. *Bowers* simply did not *sub silentio* dispose of petitioner's case as the Court of Appeals inferred. *Fagg*, 34 M.J. at 180.

II. THE PETITIONER'S CONDUCT WAS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Had the Court of Military Appeals judicially construed the Federal Constitution as interpreted by this Court's prior cases and applied them to the petitioner's constitutional claims, the Court of Military Appeals would have upheld the Air Force Court of Military Review's decision

narrowing the scope of Article 125(a) as inapplicable to consensual, adult, heterosexual, noncommercial, acts of oral sex absent a compelling government interest. Petitioner's constitutional right of privacy for the consensual acts which occurred during his relationship with Ms. Coltman flows squarely and logically from the privacy rights recognized by this Court in, *inter alia*, *United States v. Griswold*, 381 U.S. 489 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Carey v. Population Services*, 431 U.S. 678 (1977).

Unlike homosexual activity, the consensual heterosexual oral sex criminalization in this case is related to "family, marriage or procreation," interests characterized as fundamental by this Court under the Due Process Clause of the Fourteenth Amendment. *See Bowers*, 478 U.S. at 191 referencing *Carey*, 431 U.S. at 688-89. As for the application of Article 125(a) to single heterosexual couples, the petitioner's acts of consensual sodomy with Ms. Coltman occurred in the bedroom of her off-base house while both were engaged in a serious dating relationship. At one point the two even contemplated marriage. As with married couples, oral sex, like vaginal intercourse, constituted a common way for this intimate heterosexual couple to relate to each other.[3] "A good sex life is central to a good overall relationship," [4] and oral sex constituted

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[3] According to researchers, oral-genital sex is a basic component of heterosexual relations in the United States among both married and unmarried couples. One study found that 72% of married and unmarried heterosexual couples engage in fellatio, and 74% engage in cunnilingus, every time they had sex, frequently, or sometimes. P. Blumstein and P. Schartz, *American Couples* 236 (1983). Another study found that approximately 80% of single men and women aged 25-34 have engaged in oral-genital sex. M. Hunt, *Sexual Behavior in the Seventies* 198-99 (1974). A more recent study found that more than 90% of married couples younger than 25 had engaged in oral sex; more than 90% of heterosexual couples of all ages had engaged in oral sex. J. Reinisch, *The Kinsey Institute New Report on Sex* 132 (1990).

[4] Blumstein & Schwartz, *supra* note 3, at 193.

one way in which this couple explored the depth and meaning of their relationship. Moreover, the petitioner's heterosexual relationship with Ms. Coltman, unlike a homosexual relationship, involved "two individuals, each with a separate intellectual and emotional makeup," *Eisenstadt*, 405 U.S. at 453, for which the option to formalize their relationship in marriage and to bear or beget children was legally viable. The petitioner's conduct while courting Ms. Coltman, far from being criminal, is more akin to that which "attend the creation and sustenance of a family," *Roberts v. Jaycees*, 468 U.S. 609, 619 (1984), and is thus protected by a constitutional right of privacy. Although the "outer limits of [the right of personal privacy] have not been marked by the Court," *Carey*, 431 U.S. at 684, surely the petitioner's right to engage in consensual, adult, heterosexual, noncommercial, acts of oral sex with a person with whom he had a serious dating relationship fall within that outer limit. The petitioner's acts, under the facts of this case, involve the very kind of individual liberty which the Bill of Rights is designed to secure, dealing as it did with a "highly personal relationship" which should be afforded "a substantial measure of sanctuary from unjustified interference by the state." *Roberts*, 468 U.S. at 618. The particular association between the petitioner and Ms. Coltman was "sufficiently personal or private to warrant constitutional protection," notwithstanding the fact they were not married to each other, as this Court has "not held a constitutional protection as restricted to family members." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). It is therefore not surprising, as noted by the Air Force Court of Military Review, that Oklahoma, where petitioner's conduct occured, found that the Federal Constitution protected acts such as the appellant's, or that this Court denied certiorari when that decision was appealed. *Hinkle v. State*, 771 P.2d 232, 233 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 890 (1986).

Moreover, unlike the claimed fundamental right to engage in homosexual sodomy, the petitioner's claim does not threaten to take the constitutional right of privacy "down the road" to legalized "adultery, incest, and other sexual crimes . . ." *Bowers*, 478 at 195-96. In fact, the Air Force court made it abundantly clear that its decision was not implicating sodomy convictions under Article 125(a) which have been sustained "where the government's interest in prosecuting is clear; for example: the acts were not private; the acts were nonconsensual; a minor was involved; the acts were incestuous; or duty relationships need for military discipline were shown." *Fagg*, 33 M.J. at 620, 621 (citations omitted).

Not only does the Court of Military Appeal's decision uphold the constitutionality of Article 125(a)'s broad prohibition as applied in petitioner's case, it also gives military prosecutors a unconstitutional *imprimatur* for prosecutions of married military couples who engage in identical sexual behavior in the sanctity of the bedroom. The Court of Military Appeals' reasoning with regard to Article 125(a)'s constitutionality as applied to the petitioner's case is equally applicable to married couples. Specifically, this Court also "failed" to give an "indication" in *Bowers* as to the constitutionality of prosecuting marital sodomy which would permit the Court of Appeals to "override the intent of Congress" criminalizing all sodomy. *Fagg*, 34 M.J. at 180. The Court of Military Appeals' criminalization of marital sodomy occurred even though the Georgia Attorney General in *Bowers* conceded that the Georgia statute would be unconstitutional as applied to a married couple in light of the marital privilege identified by this Court in *Griswold*. *Bowers*, 478 U.S. at 218 n. 10 (Stevens, J., dissenting). The Court of Military Appeals' attempts to downplay the unconstitutionally broad reach of their opinion upholding Article 125(a) *in toto* by distinguishing between married and single couples ("we see nothing in the *Hardwick* majority opinion which suggests that the sanctity of the marital bedroom is in

jeopardy," *Henderson*, 34 M.J. at 178 n. 8) is unsupportable under this Court's precedent. In fact, this Court in *Einsenstadt* recognized that the right of privacy inured to single as well as married individuals and struck down as unconstitutional a statute forbidding the sale of contraceptives to single persons. 405 U.S. at 1038.

III. THE PETITIONER'S PROSECUTION VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

The Court of Military Appeals' failure to judicially scrutinize Article 125(a) with regard to the appellant's constitutional claims, and its corresponding reversal of the Air Force Court of Military Review, also violated the due process rights of the petitioner. The petitioner's intimate acts with Ms. Coltman occurred in Oklahoma, a state in which acts of cunnilingus and fellatio had been criminalized. *See Post*, 715 P.2d 1107-08 at n. 1. As the Air Force Court of Military Review observed, the Oklahoma statute criminalizing these acts was held by the Oklahoma Court of Criminal Appeals in 1986 to be violative of the right of privacy under the United States Constitution as applied to nonviolent, consensual activity between adults. *Post*, 715 P.2d at 1109-10, *discussed in Fagg*, 33 M.J. at 621. This constitutional protection was reaffirmed in the wake of the Court's opinion in *Bowers*, over a full year prior to the petitioner's acts with Ms. Coltman. *Hinkle*, 771 P.2d at 233.

The petitioner's prosecution and conviction for acts previously construed by the petitioner's domicile state as protected under the Federal constitution violated the Fifth Amendment's Due Process Clause. Under the Fourteenth Amendment's Due Process Clause, state convictions regarding offenses for which an accused had a lack of "fair warning" resulting from an unforeseeable and retroactive judicial expansion are unconstitutional. *Bouie v. Columbia*, 378 U.S. 347, 352 (1964). This is true whether the unforeseeable construction is of either "a narrower and

precise statutory language," *Bouie*, 378 U.S. at 352, or of a statute involving "sweeping language" whose "reach has been confined within the constitutional limits announced by this Court." *Marks v. United States*, 430 U.S. 188, 195 (1977). In both situations, the underlying principle is identical: "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state supreme court is barred by the Due Process Clause from achieving the same result by judicial conviction." *Bouie*, 378 U.S. at 353. This same principle is applicable to interpretations of federal statutes.

Petitioner was unconstitutionally lulled "into a false sense of security." *Bouie*, 378 U.S. at 352. Petitioner had no reason to suspect that the Federal Constitution, which confined the reach of the sodomy statute in his domicile state and protected his acts there from prosecution, would subsequently be interpreted as failing to accord him the same protection when prosecuted via an Air Force court-martial. The fact that the petitioner was tried at Altus Air Force Base instead of the corresponding state court for the town of Altus, Oklahoma does not defeat the petitioner's due process claim, as alluded to by the Court of Military Appeals in *Fagg*, 34 M.J. at 180, when it relied on *Henderson*, 34 M.J. at 178 (although Massachusetts did not deem fellatio criminal, the Court of Military Appeals gauged the case against Federal statute and Constitution). Unlike the case in *Henderson*, the petitioner's domicile state found acts such as the petitioner's protected by the Federal, not state, Constitution. *Hinkle*, 771 P.2d at 233; *Post* 715 P.2d at 1109-10. Additionally, when rejecting a judicial *ex post facto* constitutional attack on a broadly written Tennessee statute judicially interpreted as proscribing sodomy, this Court, *inter alia*, looked to other jurisdictions and found that they had already reasonably construed identical statutory language to apply to the challenged acts. *Rose v. Locke*, 423 U.S. 48 (1978). Such an analysis supports the peti-

tioner's due process claim in this case. Not only had the state in which the petitioner's acts took place previously found the Federal Constitution narrowed Oklahoma's proscription against sodomy, the petitioner's adult, private, consensual, noncommercial, heterosexual acts would not be criminal in the vast majority of states.[5] Moreover, the Air Force's failure to enforce Article 125(a)'s prohibition against consensual sodomy as applied to private, noncommercial, consensual, heterosexual, adult sodomy absent a compelling government interest,[6] also added to

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[5] In fact, only seventeen states have statute on the books which criminalize both heterosexual and homosexual sodomy. Ala. Code § 13A-6-65(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1989); D.C. Code Ann. § 22-3502 (1989); Fla. Stat. Ann. § 800.02 (1976) (deviate sexual intercourse) (Florida now punishes sodomy under this statute after its sodomy statute (§ 800.01) was declared unconstitutional in *Franklin v. State*, 257 So.2d 21 (Fla. 1971)); Ga. Code Ann. § 16-6-2 (Michie 1988); Idaho Code § 18-6605 (1987); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Ann. Code art. 27, §§ 553, 554 (1992); Mich. Comp. Laws Ann. § 750.158 (West 1991); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1973); N.C. Gen. Stat. § 14-177 (1991); Okla. Stat. Ann. tit. 21, § 886 (West 1983); R.I. Gen. Laws § 11-10-1 (1981); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Utah Code Ann. § 76-5-403 (1990); Va. Code Ann. § 18.2-361 (Michie 1988). Moreover, the constitutionality of these statutes, under either the respective state or the Federal Constitution, is an open question. *See e.g., Schochet v. State*, 580 A.2d 176 (Md. 1990) (narrowing Maryland's broad sodomy statute).

Seven states criminalize only homosexual sodomy. Ark. Code Ann. § 5-14-122 (Michie 1987); Kan. Stat. Ann. § 21-3505 (1988); Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1990); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. §§ 45-5-505, 45-2-101(20) (1991); Nev. Rev. Stat. Ann. § 201.190 (Michie 1986); Tenn. Code Ann. § 39-13-510 (1991).

[6] In fact, in the last five years, there had been 36 cases of violations of Article 125(a) prosecuted. Memorandum from Air Force Legal Services Center, Military Justice Division, Personnel Accused of Sodomy—Other Cases (June 6, 1992) (on file with Air Force Legal Services Agency, Appellate Defense Division). Of these, 14 involved homosexual activity, 22 involved heterosexual activity. Of those prosecuted for heterosexual activity, the sodomy charge was

the petitioner's lack of fair warning that his intimate conduct with Ms. Coltman would be prosecuted, as does the fact that previously published Court of Military Appeals cases in this area involved charges that were referred against an accused for sodomy "by force and without consent," *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979), or involved fellatio which occurred in a public place, *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A. 1978).

The petitioner's prosecution also violated the Equal Protection Clause of the Fifth Amendment. Petitioner was prosecuted for violating Article 125(a) despite the fact that there is no evidence that any married couple has ever been prosecuted by the Air Force for engaging in the same acts.[7] *Eisenstadt* struck down as violative of the Equal Protection Clause of the Fourteenth Amendment a Massachusetts law distinguishing between married and single persons with regard to access to birth control because there was no difference that rationally explained the different treatment accorded married and unmarried persons. *Eisenstadt*, 405 U.S. at 1038. Similarly, there is no difference which explains why an unmarried person such as the petitioner has been subject to prosecution in this case under Article 125(a) when married persons have not been. Accordingly, the dissimilar treatment afforded the petitioner and married persons in terms of Article 125(a)'s enforcement violated the Equal Protection Clause of the Fifth Amendment.

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within the context of an adulterous relationship, in a public or semi-public place, involved superior-subordinate military contact, involved family members or minors, or a combination of the above. None involved married parties, or was similar to the private, heterosexual, noncommercial acts engaged in by the petitioner and Ms. Coltman in which a military government interest was so utterly lacking. Due to the logistics involved, this inquiry delved into the past 5 years, but we expect a more exhaustive investigation would have yielded similar results.

[7] *See supra* note 6.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is imperative to resolve the issue left undecided in *Bowers*: the constitutionality of applying sodomy laws to heterosexual oral sex. The decision below erroneously relied exclusively on *Bowers* to reverse the Air Force Court of Military Review's opinion granting constitutional protection to private, consensual, heterosexual, noncommercial adult sodomy. Unlike the claimed homosexual right to engage in sodomy rejected in *Bowers*, heterosexual oral sex is inextricably intertwined with interests involving marriage, family, and procreation. These heterosexual acts are thus deserving of constitutional privacy protection against government intrusion absent a compelling government interest, a protection which was stripped from military married and single couples by the decision below. The petitioner's case should also be reviewed because his prosecution for acts protected by the Federal Constitution in his domicile state violated the Fifth Amendment's Due Process Clause, and the Air Force's decision to enforce Article 125(a) against the petitioner, but not married couples (thus far), violates the Equal Protection Clause of the Fifth Amendment.

Respectfully submitted,

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June 1992

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,216

ACM 29129

UNITED STATES,

Appellant

v.

SCOTT P. FAGG, Airman, U.S. Air Force,

Appellee.

Argued Dec. 5, 1991

Decided March 24, 1992

For the Accused: *Captain Beverly B. Knott* (argued); *Colonel Jeffrey R. Owens* (on brief).

For the United States: *Major Paul H. Blackwell, Jr.* (argued); *Lieutenant Colonel Brenda J. Hollis* (on brief); *Captain James C. Sinwell.*

Opinion of the Court

COX, Judge:

This case is a companion to *United States v. Henderson*, 34 MJ 174 (CMA 1992), also decided this day. As in *Henderson*, the issues before us concern the constitutionality of Article 125(a), Uniform Code of Military Justice, 10 USC § 925(a), which proscribes "sodomy," statutorily defined as "unnatural carnal copulation with

another person of the same or opposite sex or with an animal." For the reasons stated in *Henderson*, we uphold the constitutionality of Article 125(a).

The accused was convicted, in accordance with his pleas, of one specification of consensual sodomy (fellatio and cunnilingus) and one specification of carnal knowledge [Art. 120(b), UCMJ, 10 USC § 920(b)]. A military judge sitting alone as a general court-martial at Altus Air Force Base, Oklahoma, sentenced the accused to a bad-conduct discharge, confinement for 7 months, and reduction to airman basic, which the convening authority approved. At the Court of Military Review, the accused argued that the sodomy conviction should be reversed, and the majority of that court agreed, "recogniz[ing] a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults." 33 MJ 618, 619 (1991).

The Acting Judge Advocate General of the Air Force certified these issues for review:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT RECOGNIZED A "CONSTITUTIONAL ZONE OF PRIVACY FOR HETEROSEXUAL, NONCOMMERCIAL, PRIVATE ACTS OF ORAL SEX BETWEEN CONSENTING ADULTS," THEREBY SETTING ASIDE AN ARTICLE 125 SODOMY CONVICTION.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT HELD THAT THERE MUST BE A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO SUSTAIN A CONVICTION UNDER ARTICLE 125 FOR A PRIVATE, HETEROSEXUAL, NONCOMMERCIAL, CONSENSUAL ADULT ORAL SEX ACT.

In reality, it would appear that sodomy had little bearing on sentence. By his own unabashed account, the accused, an 18-year-old airman, cut a rather wide swath through the pubescent female population of Altus, Oklahoma, in his first year after basic training. Unfortunately for him, his quest led him a little too close to the cradle on one occasion—with a 14-year-old junior high school student. In the military, carnal knowledge (sexual intercourse with a female under age 16) carries a maximum punishment of dishonorable discharge, confinement for 15 years, reduction, and total forfeitures. Para. 45a(2), Part IV, Manual for Courts-Martial, United States, 1984.

Be that as it may, for the reasons announced in *Henderson*, we reverse that portion of the Court of Military Review's decision setting aside the sodomy conviction, and we reinstate it. Like Judge James, dissenting below, we may sympathize with the accused regarding this particular conviction for what was unquestionably consensual conduct.* Nevertheless, we detect no indication from the Supreme Court which permits us to override the intent of Congress. *See Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

The decision of the United States Air Force Court of Military Review dismissing the sodomy specification and reassessing the sentence is reversed. The findings of guilty of sodomy (the Additional Charge and its specification) and the original sentence are reinstated. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for fur-

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* Ironically, it was the accused's jilted 16-year-old partner in sodomy who reported him to the police, after he had left her first for another 16-year-old and then for the 14-year-old. Before the complaint was lodged, however, the accused had already moved on to an 18-year-old, whom he married on the eve of his Article 32, Uniform Code of Military Justice, 10 USC § 832, investigation, after a 2-month acquaintanceship.

ther review of the approved findings and the original sentence under Article 66(c), UCMJ, 10 USC § 866(c).

Chief Judge SULLIVAN, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

Judge WISS did not participate.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 29129

UNITED STATES

v.

AIRMAN SCOTT P. FAGG, FR414-47-3344
United States Air Force

Sentence Adjudged 12 Dec. 1990

Decided 6 Aug. 1991

Appellate Counsel for the Appellant: Captain Beverly B. Knott (argued), Lieutenant Colonel Jeffrey R. Owens, and Major G. Michael Lennon.

Appellate Counsel for the United States: Colonel William T. Hoffman (argued), Colonel William R. Dugan, Jr., and Major Paul H. Blackwell, Jr.

Before LEONARD, RIVES and JAMES, Appellate Military Judges.

OPINION OF THE COURT

RIVES, Judge:

Today we recognize a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults. Since that right to privacy is not outweighed by any compelling governmental inter-

est under the facts of this case, we reverse the appellant's sodomy conviction.

The appellant, Airman Scott P. Fagg, was 18 years old when he engaged in sexual acts with young women he was dating. Facing court-martial charges for some of those acts, he pleaded guilty to carnal knowledge with a 14-year-old and sodomy with a 16-year-old. He elected trial by military judge alone at his general court-martial. His adjudged and approved sentence is a bad conduct discharge, confinement for 7 months, and reduction to E-1.

Airman Fagg admitted engaging in oral sex (both cunnilingus and fellatio) on numerous occasions with his 16-year-old girlfriend, who is treated as an adult for these purposes under military law. Article 125, 10 U.S.C. § 925 proscribes "unnatural carnal copulation with another person of the same or opposite sex." The article's broad statutory language prohibits all sodomy, whether consensual or forcible, private or public, heterosexual or homosexual. The Manual for Coutrs-Martial finds particular aggravation for sentencing when the act is "done with a child under the age of 16" or when it is done "by force and without the consent of the other person." MCM, Part IV, paragraph 51b(2) and (3) (1984); *see also* MCM, Part IV, paragraph 51e (1984) (providing increased punishments when such aggravation is proven).

The Article 125 prohibition of "unnatural carnal copulation" has withstood attacks that it is unconstitutionally vague. *United States v. Scoby*, 5 M.J. 160 (C.M.A.1978). The term "unnatural carnal copulation" has been defined to include both fellatio and cunnilingus. *United States v. Harris*, 8 M.J. 52 (C.M.A.1979). At issue in this case is whether a private, consensual, heterosexual, adult act of oral sodomy can be prosecuted as a violation of Article 125.

The appellant urges that applying Article 125 to his fact situation violates his constitutional right to privacy.

Although the Constitution does not mention any specific 'right to privacy," it was noted long ago that the framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.*" *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (emphasis added).

A fundamental, constitutional right to privacy was expressly recognized in *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965), when the Court held that a state could not constitutionally regulate the distribution of contraceptives to married couples. The Court reasoned that a "zone of privacy" is implicitly included among the rights that were enumerated in the Constitution. *Id.* at 484, 48 S.Ct. at 574-75.

The right to privacy was extended to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), when the Court ruled that a statute regulating distribution of contraceptives to single adults was unconstitutional. The Court observed: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453, 92 S.Ct. at 1038.

Privacy rights are not limited to matters of procreative choice. Predating *Eisenstadt* is *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), which holds that an individual's right to view obscene material in the privacy of the home cannot be regulated by the state. Thus, the Court has recognized a right of privacy, whether within or outside a marital relationship, that extends into the area of sexual intimacy.

The Supreme Court has noted that "the outer limits" of the right to privacy "have not been marked." *Carey v. Population Services International*, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). It has been determined, however, that the right to privacy does not protect an accused charged with homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 190, 196, 106 S.Ct. 2841, 2846-47, 92 L.Ed.2d 140 (1986). While the statute at issue in *Bowers* (like Article 125) prohibits all acts of sodomy, the Court carefully limited its ruling: "We express no opinion on the constitutionality of the . . . statute as applied to other acts of sodomy." *Id.* at 188 n. 2, 106 S.Ct. at 2842 n. 2. Addressing this point in his dissent, Justice Stevens stated it was clear to him that a state "may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' *Griswold*, 381 U.S., at 485 [85 S.Ct. at 1682], or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U.S., at 453 [92 S.Ct. at 1038]." *Bowers*, 478 U.S. at 218, 106 S.Ct. at 2858.

When a fundamental personal liberty (such as the right to privacy) is involved, that right is subject to regulation only insofar as the intrusion is necessary to promote a "compelling state interest." *See, e.g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973); *Griswold*, 381 U.S. at 497-98, 85 S.Ct. at 1688-89 (Goldberg, J., concurring).

Military law has long recognized that the "wholly private moral conduct of an individual" cannot be regulated. *United States v. Snyder*, 1 U.S.C.M.A. 324, 427, 4 C.M.R. 15, 19 (1952). An individual's right to engage in certain sexual activities, however, is not without limits. Thus, while fornication per se is not a crime under the UCMJ, *United States v. Burns*, 25 C.M.R. 791, 794 (A.F.B.R.1957), *pet. denied*, 25 C.M.R. 486 (1958), aggravating circumstances can provide the state with a compelling interest to justify a prosecution (e.g., for

adultery) where the underlying act is fornication. *See United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R.1990) (aggravation provided by an officer-enlisted, supervisor-subordinate duty relationship), *pet. granted*, 33 M.J. 161 (C.M.A.1991).

Appellate courts have sustained convictions under Article 125 where the government's interest in prosecuting is clear; for example: the acts were not private, *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A.1978); *United States v. Linnear*, 16 M.J. 628 (A.F.C.M.R.1983), *pet. denied*, 17 M.J. 277 (C.M.A.1983); the acts were non-consensual, *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984); *United States v. Means*, 20 M.J. 522 (A.C.M.R. 1985), *affirmed*, 25 M.J. 160 (C.M.A.1987); *United States v. Jones*, 14 M.J. 1008, 1009 (A.C.M.R.1982); a minor was involved, *United States v. Romey*, 32 M.J. 180 (C.M.A.1991); *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R.1988); the acts were incestuous, *United States v. Ciulla*, 29 M.J. 868 (A.F.C.M.R.1989); or duty relationships/need for military discipline were shown, *United States v. Wilson*, 28 M.J. 48 (C.M.A.1989); *United States v. Hardy*, 30 M.J. 757 (A.C.M.R.1990); *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R.1985).

We note that while sodomy was illegal in all 50 states in 1960, by 1986 only half continued to criminalize acts of sodomy occuring "in private and between consenting adults." *Bowers*, 478 U.S. at 193-94, 106 S.Ct. at 2845-46; *see generally* Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R.4th 1009 (1983). The appellant's acts took place primarily in a private (off-base) home near Altus Air Force Base, Oklahoma. Of some interest is the fact that Oklahoma courts have interpreted the Federal Constitution to convey a right of privacy that would preclude this appellant's prosecution in State court. *See Hinkle v. State*, 771 P.2d 232, 233 (Okl.Crim.App.1989); *Post v. State*, 715 P.2d 1105 (Okl.

Crim.App.1986), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986).

Analyzing the facts of this case, we find a fundamental right of sexual privacy for the appellant's consensual, adult, heterosexual, noncommercial, private acts of oral sex. The circumstances of this case fail to reflect a compelling governmental interest to justify intruding into that relationship. The private nature of the acts avoids any threat to public morality; indeed, no harm to anyone has been shown from the appellant's conduct. In the many Article 125 prosecutions this Court has reviewed, none has resulted from a fact situation as *un*aggravated as the appellant's. Only had the appellant and his partner been married to each other would his case present less aggravation. We hold that the constitutional right of privacy protects the appellant's conduct from prosecution. *See Scoby, supra*, 5 M.J. at 166.

Our decision limits the scope of Article 125; it does not invalidate the statute. We are sensitive to our status as a court, not a legislature. The statute is written in very broad language, however, and questions about its reach are raised by its silence as to the matters we find relevant here. To sustain a prosecution under Article 125 for a private, heterosexual, noncommercial, consensual adult sex act, aggravating factors that support a compelling interest to regulate such conduct must be present. *Contra United States v. Henderson*, 32 M.J. 941, 946 (N.M.C.M.R.1991).

The findings of guilty to sodomy (the Additional Charge and its specification) are set aside and dismissed. We are satisfied that we can reassess the sentence for the remaining findings of guilty. *United States v. Peoples*, 29 M.J. 426 (C.M.A.1990); *United States v. Sales*, 22 M.J. 305 (C.M.A.1986). Considering all relevant matters before the Court on the remaining charge and its specification, we approve a sentence of confinement for 7 months and reduction to the grade of E-1. Next, con-

sidering appellant's assertion that his sentence is too severe, we examine the entire record of trial and find the reassessed sentence appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The approved findings of guilty and the sentence, both as modified, are correct in law and fact and are

AFFIRMED.

Senior Judge LEONARD concurs.

JAMES, Judge, dissenting:

My brethren probably do what is best today, and their vote gives me the luxury of dissent.

The first premise in the logical argument in this case must be, "There is a constitutional right of privacy that protects consenting, heterosexual, adult, private, non-commercial, untraditional,[1] sexual activity," but there is no authority for that proposition among the decisions of the Supreme Court of the United States. It has come close in opinions about procreation, marital and family relationships, and freedom to think, but it has not yet spoken on heterosexual copulatory mechanics. Other jurisdictions have been called upon to decide the same issue, and they have split. Of all their decisions, *Schochet v. State*, 75 Md. App. 314, 541 A.2d 183 (Md.App.1988), so well states my views that I cannot improve upon its analysis and nothing of consequence has happened in the 3 years since it was written.[2] In brief, the decisions of

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[1] Non-vaginal sex. I do not overlook the recent polls and the relics of the ancient world that suggest that fellatio and cunnilingus might be as much the norm as other forms of sexual activity. Neither the polls nor mores nor morality can be at issue until one first decides whether there is a constitutional protection.

[2] The decision to which I cite was overruled by the state supreme court. *Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990). The higher court's approach and analysis do not detract from the reliability of the analysis of the intermediate court.

the Supreme Court have not yet provided enough information that its direction on this issue can be predicted. It is on precisely this point that the majority and I disagree. I must dissent. I would affirm, though with enormous reluctance.

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67216/AF

CMR Dkt. No. 29129

UNITED STATES,

Appellee

v.

SCOTT P. FAGG (414-47-3344),

Appellant

ORDER

Because no petition for reconsideration has been filed within the period prescribed by Rule 31(a) of the Rules of Practice and Procedure, United States Court of Military Appeals, it is by the Court this 14th day of April 1992,

ORDERED:

That this Court's opinion in the above-entitled case (34 MJ 179) is now final.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BLACKWELL)
Appellate Government Counsel (KNOTT)

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No. 91-2042

Supreme Court, U.S.
FILED
JUL 21 1992
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SCOTT P. FAGG,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Military Appeals

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BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2042

SCOTT P. FAGG,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents Navy and Marine Corps personnel on appellate review of court-martial convictions. This Division currently represents several service members who have been convicted of either engaging in or attempting to engage in consensual, private, noncommercial, heterosexual oral sex. Unless the Court grants the petition for certiorari, the Court of Military Appeals' ruling will govern these cases' outcome. Because a service member has a right to petition the Supreme Court for certiorari only if the Court of Military Appeals exercises its discretionary jurisdiction to review the case,[1] these service members may never have an opportunity to file their own petitions for certiorari seeking review of the constitutionality of criminalizing consensual heterosexual oral sex.

[1] 10 U.S.C.A. § 867a (West Supp. 1991); 28 U.S.C.A. § 1259 (West Supp. 1991).

ARGUMENT

I. THERE IS A SPLIT AMONG VARIOUS STATE AND FEDERAL JURISDICTIONS OVER WHETHER THE UNITED STATES CONSTITUTION PROHIBITS THE CRIMINALIZATION OF CONSENSUAL, NONCOMMERCIAL, PRIVATE, HETEROSEXUAL ORAL SEX.

"[A]mong the courts addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private, there is a significant division throughout the country." *Schochet v. State*, 580 A.2d 176, 181 (Md. 1990). The United States Court of Military Appeals has ruled that the Constitution does not limit Congress' authority to criminalize heterosexual fellatio. *United States v. Henderson*, 34 M.J. 174, 176-78 (C.M.A. 1992). The Rhode Island Supreme Court, North Carolina Court of Appeals, Indiana Supreme Court, Arizona Supreme Court, New Mexico Supreme Court and, in an opinion which was later reversed, Maryland Court of Special Appeals have ruled that the United States Constitution accords no protection to acts of consensual heterosexual sodomy performed by unmarried adults.[2]

In stark contrast to these decisions, a number of jurisdictions have held that the Constitution precludes the criminalization of consensual, private, noncommercial heterosexual oral sex. The Air Force Court of Military Review's decision in this case, 33 M.J. 618 (A.F.C.M.R. 1991), *rev'd*, 34 M.J. 179 (C.M.A. 1992), the Iowa Supreme Court, the Massachusetts Supreme Judicial Court, the New York Court of Appeals, the Oklahoma Court of

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[2] *State v. Santos*, 413 A.2d 58 (R.I. 1980) (rejecting challenge to proscription of anal intercourse); *State v. Poe*, 252 S.E.2d 843 (N.C. App.), *cert. denied*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980); *Dixon v. State*, 268 N.E.2d 84, 86 (Ind. 1971); *State v. Bateman*, 547 P.2d 6, 9, 10 (Ariz.), *cert. denied*, 429 U.S. 864 (1976); *State v. Elliott*, 551 P.2d 1352 (1976); *Schochet v. State*, 541 A.2d 183 (Md. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).

Criminal Appeals, and the Pennsylvania Supreme Court have recognized such a constitutional right.[3]

In decisions which preceded *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Seventh Circuit Court of Appeals suggested and two United States District Courts held that the Constitution prohibits states from criminalizing private, consensual acts of sodomy performed by married couples.[4] Additionally, in a post-*Eisenstadt* case, another United States District Court suggested in *dicta* that the Constitution bars states from restricting private acts of heterosexual fellatio performed by consenting married or unmarried adults. *Lovisi v. Slayton*, 363 F. Supp. 620, 624-26 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied sub nom. Lovisi v. Zahrandick*, 429 U.S. 977 (1976).

The Maryland Court of Appeals concluded, "very strong arguments, based on Supreme Court decisions and language in Supreme Court opinions, can be made on both sides of the constitutional right to privacy issue presented here." *Schochet*, 580 A.2d at 181. These strong conflicting arguments demonstrate the need for the Court to resolve this constitutional question.

II. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CONSIDER THE APPROPRIATE USE OF LEGISLATIVE HISTORY IN STATUTORY CONSTRUCTION.

Unlike such cases as *Rose v. Locke*[5] and *Bowers v.*

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[3] *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). *See also State v. Saunders*, 381 A.2d 333 (N.J. 1977) (holding that the federal Constitution precludes criminalization of fornication).

[4] *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Travers v. Paton*, 261 F. Supp. 110 (D. Conn. 1966); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex.), *vacated on other grounds*, 401 U.S. 989 (1970).

[5] 423 U.S. 48 (1975).

Hardwick,[6] this case involves a federal statute. "When the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Accordingly, this case could be resolved on statutory construction rather than constitutional grounds.

There are fair interpretations of 10 U.S.C. § 925 which eliminate constitutional concern. The statutory proscriptions against "sodomy" and "unnatural carnal copulation" can be interpreted consistently with their common law definition, which did not include either heterosexual or homosexual oral sex acts. *See generally Rose v. Locke*, 423 U.S. 48, 53 (1975) (Brennan, J., dissenting); *Rex v. Jacobs*, 1 Russ. & Ry. 331, 332, *reprinted in* 168 Eng. Rep. 830, 830 (1817). Alternatively, the Court could apply the rule of lenity to exclude heterosexual oral sex from the statute's scope.

Determining whether such a construction of 10 U.S.C. § 925 would be "plainly contrary to the intent of Congress"[7] involves an important and recurring question of statutory construction: how much weight should a court give to statements in a statute's legislative history?

No Member of Congress discussed the military sodomy statute in any floor or committee debate. The statute's *entire* legislative history consists of one stylistic change proposed by the Senate Armed Services Committee but not ultimately adopted,[8] and "references" and a brief "commentary" in the House hearings:

> *References.*—A.W. 93; proposed A.G.N., article 9 (39); N.C.&B., section 108.
>
> *Commentary.*—This article covers the same elements as the Army and Navy definition of the offense.

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[6] 478 U.S. 186 (1986).

[7] *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988).

[8] S. Rep. No. 486, 81st Cong., 1st Sess. 285 (1949)

Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session on H.R. 2498, 81st Cong., 1st Sess. 1233 (1949). The three references, which were not quoted in any committee report, hearing or floor debate dealing with 10 U.S.C. § 925's adoption, do not specifically indicate whether they proscribe heterosexual oral sex.[9] Earlier

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[9] The first of the "references," Article of War 93, 41 Stat. 787, 805 (1920), provided:

> Art. 93. Various Crimes.—Any person subject to military law who commits . . . sodomy . . . shall be punished as a court-martial may direct. . . .

The second reference, proposed Article for the Government of the Navy 9(39), provided:

> Such punishment, other than death, as a court-martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy . . . [who] is guilty of . . . sodomy or any other unnatural sexual act. . . .

H.R. 3687, 80th Cong., 1st Sess. § 11 (1947); S. 1338, 80th Cong., 1st Sess. § 11 (1947).

The final reference, Naval Courts and Boards at § 108 (1937), provided:

> 108. Sodomy.—This is provided for under the 22nd A.G.N. [Article 22 provided: "All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct." Rev. Stat. § 1624, art. 22, *reprinted in* 18 Stat. 274, 280 (1874).]
>
> Charge: Sodomy.
>
> Elements: Sodomy, in its broadest sense, is the carnal copulation by human beings with each other against nature or with a beast, in which sense it includes "the crime against nature," "bestiality," and "buggery." In its narrower sense sodomy is the carnal copulation between human beings per anum. Penetration is a necessary element, and when proven is sufficient for conviction. If there be doubt only as to the completion of the offense, the lesser included offense of scandalous conduct tending to the destruction of good morals should be found proved.
>
> When strictly and impartially proved, this offense well merits strict and impartial punishment; but it is from its nature so easily charged, and the negative so difficult of proof, that the accusation ought to be made out particularly clearly. The evi-

constructions of Article of War 93 did, however, include heterosexual oral sex acts within the statute's scope.[10]

Despite 10 U.S.C. § 925's scant legislative history, the Court of Military Appeals concluded, "It would be sheer fantasy for us to claim to know now that, in 1950, Congress really intended to legalize fellatio in the military." *Henderson*, 34 M.J. at 176. On the contrary, it is sheer fantasy to claim that the Members of Congress who voted on the Uniform Code of Military Justice in 1950 knew whether heterosexual fellatio was then legal or illegal.

Judge Posner observes that "legislators vote on the statutory language rather than on the legislative history." Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 274 (1982); *see also* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 317, 375 ("Relying on extrastatutory materials therefore raises the danger that unrepresentative materials will be accepted as authoritative."). To conclude that Congress intended 10 U.S.C. § 925 to continue the Army's ban on heterosexual fellatio assumes: (1) that the Members were familiar with the House hearings on the legislation; (2) that they examined the "references" included within those hearings; (3) that they then consulted earlier interpretations of those references; and (4) that they adopted the Army's construction rather than the Navy's equivocal definition of "sodomy." *See* Naval Courts and Boards at § 108, *supra* note 9. Such an implausible fiction must be rejected as a means of interpreting a criminal statute.[11] Reviewing this case would allow the Court to assess the propriety of relying on legislative history once- or twice-removed as a means of statutory construction.

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dence should be plain and satisfactory in proportion as the crime is detestable.

[10] *See, e.g.*, Manual for Courts-Martial, U.S. Army, 1949, at ¶ 180*j* discussion; *United States v. Mullarkey*, 77 B.R. 247, 255 (1948).

[11] *Cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring) ("necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.").

CONCLUSION

A number of state and federal courts have examined the constitutionality of limiting consensual, noncommercial, private, heterosexual oral sex. No consensus has emerged from these decisions; rather, there has been an "approximately even division among appellate courts." *Schochet*, 580 A.2d at 183. This split among jurisdictions warrants the Court's resolution of the issue.

Alternatively, because the statute at issue is a federal law, the Court may choose to construe the statute in order to avoid the constitutional issue. This course would also lead to an important legal question concerning the appropriate use of legislative history in statutory construction. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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No. 91-2042

In the Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT P. FAGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether convicting petitioner under Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925, for engaging in sodomy with a 16-year-old girl to whom he was not married, violated his constitutional right to privacy.

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SCOTT P. FAGG, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-4a, is reported at 34 M.J. 179. The opinion of the Air Force Court of Military Review, Pet. App. 5a-12a, is reported at 33 M.J. 618. The opinion of the court of military review on remand is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 24, 1992. The petition for a writ of certiorari was filed on June 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Altus Air Force Base in Oklahoma, petitioner, a member of the United States Air Force, was convicted on one count of carnal knowledge and one count of sodomy, in violation of Articles 120(b) and 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920(b) and 925. He was sentenced to seven months' confinement, a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review initially set aside petitioner's conviction for sodomy, affirmed the conviction for carnal knowledge, and approved the portion of the sentence that extended to confinement and reduction in rank. The Judge Advocate General of the Air Force certified the case for review by the Court of Military Appeals with regard to the dismissal of petitioner's sodomy conviction. The Court of Military Appeals reversed the decision dismissing the sodomy charge, reinstated the original findings and sentence, and remanded the case to the court of military review. On remand, the court of military review affirmed the original findings and sentence.

1. At trial, petitioner pleaded guilty to the two offenses of which he stands convicted, entered into a stipulation of fact with the prosecution, and participated in an inquiry with the trial judge to insure that his pleas were provident. Tr. 12-25. By his own account, petitioner was involved with several young girls in and around Altus, Oklahoma. Petitioner's partner in sodomy was a 16-year-old who reported him to police after he left her for another 16-year-old and then for a 14-year-old junior high school student, who was his victim in the carnal knowledge offense. Pet. App. 3a.

2. In the court of military review, petitioner argued that Article 125, UCMJ, 10 U.S.C. 925, was unconstitutional as applied to his heterosexual, noncommercial, private acts of sodomy with a consenting 16-year-old. Pet. App. 6a. A panel of the court of military review agreed by a divided vote, recognizing, for the first time by any military appellate court, a constitutional zone of privacy for such activity. Pet. App. 5a.

3. The Court of Military Appeals reversed the decision of the court of military review, relying on its decision in a companion case decided the same day, *United States* v. *Henderson*, 34 M.J. 174 (C.M.A. 1992). Pet. App. 1a-2a. *Henderson* acknowledged that this Court has accorded constitutional protection to a number of interests in the name of privacy. 34 M.J. at 176. Nonetheless, *Henderson* followed the reasoning of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in upholding Article 125, UCMJ, 10 U.S.C. 925. 34 M.J. at 177.

ARGUMENT

1. Petitioner contends that his sodomy conviction violates his constitutional right to privacy. Petitioner bases his argument on decisions of this Court such as *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), *Stanley* v. *Georgia*, 394 U.S. 557 (1969), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977). His claim does not warrant review by this Court. [1]

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[1] The Court of Military Appeals noted that "[i]n reality, it would appear that sodomy had little bearing on sentence." Pet. App. 3a. That observation is correct. Petitioner did not in the military courts, and does not in this Court, contest his conviction for the more serious offense of carnal knowledge committed with a 14-year-old, which carries a maximum punishment that includes 15 years' imprisonment and a dishonorable discharge. *Ibid.* He was sentenced to seven months' confinement,

a. Petitioner overlooks the fact that he was an adult, PX 5, but his 16-year-old partner was a minor, see Okla. Stat. Ann. tit. 10, § 1101(1) (West 1987 & Supp. 1992); Okla. Stat. Ann. tit. 15, § 13 (West 1983) ("Minors, except as otherwise defined by law, are persons under eighteen (18) years of age."). That fact is highly significant. It is universally accepted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). As Justice Brennan has noted, "the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford* v. *Kentucky*, 492 U.S. 361, 395 (1989) (dissenting opinion). See also, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

Society has long attempted to protect minors from the adverse consequences of their immaturity by means such as laws prohibiting adults from contributing to the delinquency of a minor, Okla. Stat. Ann. tit. 21, §§ 856, 857.2 (West 1983 & Supp. 1992), or prohibiting the use of children in sexual activity, 18 U.S.C. 2251-2252, 2256. This Court has also upheld such laws over constitutional challenges. See

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a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. When the court of military review originally reversed petitioner's sodomy conviction, the court left in place the seven-month term of imprisonment and the reduction in rank; the court found inappropriate only the bad conduct discharge. See Pet. App. 10a-11a.

Osborne v. *Ohio*, 495 U.S. 103 (1990); *New York* v. *Ferber*, 458 U.S. 747 (1982) (both upholding child pornography statutes); *Ginsberg* v. *New York*, *supra* (upholding statute prohibiting distribution of pornography to minors).

None of this Court's decisions is to the contrary. The privacy right recognized in *Griswold* was clearly grounded in the status of the institution of marriage.[2] Petitioner and his schoolgirl partner were not married, so *Griswold* does not aid him. *Eisenstadt* held invalid under the Equal Protection Clause a state law barring the distribution of contraceptives to unmarried adults, but it did not address the issue of state regulation of conduct toward minors. 405 U.S. at 443, 453-455. This Court in *Carey* held unconstitutional a state law prohibiting the distribution of contraceptives to minors, but that ruling does not assist petitioner. A four-Justice plurality believed that the state law implicated a minor's interest in avoiding an unwanted child. 431 U.S. at 691-699. Justice White was the fifth vote to invalidate the statute, and he concurred only in the result, on the ground that the statute did not "measurably contribute[] to the deterrent purposes which the State advances as justification for the restriction."

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[2] *Griswold* identified the petitioners as persons who "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception." 381 U.S. at 480. The Court asked, "Would we allow the police to search the sacred precincts of *marital* bedrooms for telltale signs of the use of contraceptives?," and answered: "The very idea is repulsive to the notions of privacy surrounding the *marriage* relationship." *Id.* at 485-486 (emphasis added). *Griswold* concluded: "*Marriage* is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. * * * [I]t is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486 (emphasis added).

Id. at 702. In fact, five Members of the Court either dissented from the plurality's conclusion or went so far as to label "frivolous" the claim that "a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." *Id.* at 703 (opinion of White, J.); *id.* at 702 (Burger, C.J., dissenting); *id.* at 703-710 (opinion of Powell, J.); *id.* at 713 (opinion of Stevens, J.); *id.* at 717-719 (Rehnquist, J., dissenting).

b. Amicus Navy-Marine Corps Appellate Defense Division claims that the ruling below conflicts with various lower court decisions holding unconstitutional state sodomy laws as applied to the private consensual heterosexual acts of unmarried adults. Navy-Marine Corps Amicus Br. 2-3 & n.3. Each lower court decision holding such a state law invalid under those circumstances, however, made clear that its ruling was limited to conduct between adults. In addition, several of the decisions explicitly acknowledged that the State has the power to outlaw sexual conduct between an adult and a minor.[3] Accordingly, there is no conflict among the lower courts on the question presented by this case.

2. Petitioner argues that he lacked notice that he could be court-martialed for his conduct, and that

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[3] See *State* v. *Pilcher*, 242 N.W.2d 348, 356, 359, 360 (Iowa 1976); *Commonwealth* v. *Balthazar*, 318 N.E.2d 478, 481 & n.3 (Mass. 1974); *People* v. *Onofre*, 415 N.E.2d 936, 940-941 (N.Y. 1980) (noting the absence of "the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice"), cert. denied, 451 U.S. 987 (1981); *Commonwealth* v. *Bonadio*, 415 A.2d 47, 49 (Pa. 1980) (noting that "[t]he state clearly has a proper role to perform * * * in protecting minors from being sexually used by adults"); *State* v. *Saunders*, 381 A.2d 333, 340 & n.6 (N.J. 1977).

prosecuting him for the conduct at issue here violated the equal protection component of the Due Process Clause. Pet. 10-13. Petitioner, however, has not properly preserved those claims. Petitioner did not raise those claims at trial when he pleaded guilty, nor did he assert them in either military appellate court. Accordingly, he cannot raise those claims for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's claims lack merit.

Petitioner relies on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Marks* v. *United States*, 430 U.S. 188 (1977), see Pet. 10-11, but neither decision aids him. *Bouie* and *Marks* forbid the retroactive application of an unforeseeable judicial expansion of the substantive scope of a criminal statute to reach conduct that a person could not reasonably have believed was criminal at the time he committed it. See *Rose* v. *Locke*, 423 U.S. 48, 53 (1975); *Splawn* v. *California*, 431 U.S. 595, 601 (1977) (*Bouie* held "that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited").[4] No "fair

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[4] *Bouie* held that due process barred the conviction of two black college students for their refusal to leave an "all-white" lunch counter, where the "narrow and precise," 378 U.S. at 352, state criminal trespass statute under which they were convicted on its face prohibited only the entry onto the property of another in violation of previously given notice, *id.* at 349 n.1, and where, prior to the conduct at issue, that statute never had been construed to cover the refusal to leave the property of another, *id.* at 350. *Marks* held that the new standard for determining the constitutionality of obscene materials that was adopted in *Miller* v. *California*, 413 U.S. 15 (1973),

warning" concern is present in this case, because petitioner had adequate notice that he could be prosecuted for the actions at issue here.

Article 125 of the UCMJ, 10 U.S.C. 925, prohibits sodomy, which is defined in part as the "unnatural carnal copulation with another person of the same or opposite sex." In *United States* v. *Scoby*, 5 M.J. 160, 164-166 (1978), the Court of Military Appeals indicated that a servicemember could be prosecuted under Article 125, UCMJ, 10 U.S.C. 925, for sodomy committed in either a public or private location, and this Court in *Rose* v. *Locke* upheld a state law treating sodomy as a form of "unnatural copulation," 423 U.S. at 52 (quoting *Sherrill* v. *State*, 321 S.W.2d 811, 812 (Tenn. 1959), quoting from *State* v. *Cyr*, 198 A. 743 (Me. 1938)). See also *United States* v. *Henderson*, 34 M.J. at 176 ("oral copulation has been openly and expressly prohibited in the armed forces of the United States since time immemorial"); cf. *Wainwright* v. *Stone*, 414 U.S. 21 (1973) (upholding state sodomy law over vagueness challenge). Petitioner therefore had adequate notice that his conduct could be punished under the UCMJ.

Petitioner maintains that the government violated equal protection principles by prosecuting him under the UCMJ knowing that he could not be prosecuted in the Oklahoma state courts for the conduct in question. That claim also lacks merit, for several reasons. To begin with, petitioner's argument rests on a false premise. The state decisions he cites to support his claim that he could not be prosecuted in the Oklahoma courts, *Hinkle* v. *State*, 771 P.2d 232 (Okla. Crim. App. 1989), and *Post* v. *State*, 715 P.2d 1105 (Okla. Crim.

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could not be retroactively applied to conduct that occurred prior to the decision in *Miller*. 430 U.S. at 196-197.

App. 1986), cert. denied, 479 U.S. 890 (1986), involved conduct between adults, not between an adult and a minor, which was the case here.

In addition, there is no unfairness in prosecuting a person under the UCMJ for conduct that is not a crime under state law. It is not uncommon for federal law to outlaw conduct that is not a crime under state law, or even under federal law applicable only to civilians. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733 (1974) (upholding the constitutionality of Arts. 133 and 134, UCMJ, 10 U.S.C. 933 and 934, which outlaw "conduct unbecoming an officer and a gentleman" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces"). Congress could reasonably believe that it is valuable to have a uniform code of conduct governing the actions of servicemembers, rather than rely on the different laws of the various States.

Finally, insofar as petitioner suggests that he was unfairly prosecuted, he has not alleged or proved that he was singled out on the basis of an invidious characteristic, such as race or religion, as settled equal protection principles require. See, *e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, 292 (1987); *Wayte* v. *United States*, 470 U.S. 598 (1985). At bottom, petitioner's equal protection claim is not materially different from his privacy claim, and also warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT P. FAGG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

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September 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2042

SCOTT P. FAGG,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition alleges that the age of the petitioner's girlfriend with whom he had private, heterosexual, noncommercial, consensual, adult, oral sex somehow defeats the constitutional infirmity of Article 125's blanket prohibition of all sodomy, either married or unmarried.[1] Such a reply is perplexing and irrelevant to the proper resolution of the question presented and whether a writ of certiorari should be issued in this case.

First, the issue in this case is *not* the constitutionality of Article 125 as applied to sodomy between minors and

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[1] As noted in the petitioner's Petition for a Writ of Certiorari at 9, the reversal by the Court of Military Appeals of the Air Force Court of Military Review's decision constitutionally limiting Article 125's broad reach effectively criminalized marital oral sex.

adults, as the respondent's entire Brief in Opposition pretends.[2] Indeed, the respondent's position before this Honorable Court is directly contrary to its position before the Court of Military Appeals. There, while framing the issues which that Court was then required by law to review,[3] the respondent recognized that the constitutional issue in this case was the correctness of the Air Force Court of Review's holding of a "constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting *adults.*" *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992) (emphasis added).[4] The respondent, throughout his appeal below, correctly recognized that the 18-year-old petitioner was charged with, and convicted of, *adult* consensual oral sex with his 16-year-old girlfriend. In fact, as the Air Force Court of Military Review specifically noted, the appellant's girlfriend, Ms. Coltman, was an adult under military law. *United States v. Fagg*, 33 M.J. 618, 619 (A.F.C.M.R. 1991) *citing* Manual for Court-Martial (MCM), Part IV, paragraph 51b(2) (1984) (establishing particular aggravation for sentencing under Article 125 if the act occurs with "a child under the age of 16.") That is the law of this case. Parenthetically, the potential punishment the appellant would have faced if his girlfriend would have been a "minor" would have increased from 5 to 20 years. MCM, Part IV, paragraph 51(e) (1984).

Second, the question presented by the petitioner in no manner can be construed as a constitutional attack on

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[2] The respondent's attack on the Navy-Marine Corps Appellate Defense's Amicus misses the mark for the same reason.

[3] *See infra* n. 7, 8.

[4] This Honorable Court's recent decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) lends support to the correctness of the Court of Review's holding. There, this Court recognized that "our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 112 S. Ct. at 2807 (citation omitted).

Article 125's prohibition of sodomy with a minor child. The Air Force Court of Military Review's *orbiter dictum* found constitutional Article 125's prohibition against sodomy where minors were involved. Indeed, the Court of Military Review further noted that "the government's interest in prosecuting such acts is clear." 33 M.J. at 620. The Air Force Court of Military Review found unconstitutional only those private, heterosexual, non-commercial, consensual adult sex acts for which the government does not have a compelling interest to regulate and thus prosecute under Article 125. This was the holding which was reversed by the Court of Military Appeals, giving rise to the petitioner's question presented.

Third, contrary to the respondent's contention, the 18-year-old petitioner's 16-year-old girlfriend was not a "minor" under Oklahoma law with regard to her dating relationship wherein she voluntarily engaged in oral sexual activity with the petitioner. In fact, under Oklahoma law, 16-year-olds and their partners can engage in sexual activity more involved than oral sex—actual intercourse—without criminal approbation. Okla. Stat. Ann. tit. 21, § 1111(A)(1) (1991).[5] Thus, it is illogical to asert that somehow oral sex between teenagers who are 16 years of age or older is prohibited by the State of Oklahoma, or that the teenage petitioner, by dating Ms. Coltman, was contributing to her delinquency.[6] In fact,

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[5] Indeed, the petitioner and Ms. Coltman did engage in consensual intercourse when they were 18 years- and 16 years-of age, respectively, and in doing so, violated neither military nor Oklahoma law. Contrary to respondent's assertion that petitioner contributed to the delinquency of a minor, Ms. Coltman's mother, at the pretrial hearing in this case, testified that she was aware that the petitioner and Ms. Coltman were having sexual relations, and that she even told Ms. Coltman to tell her when she needed birth control pills. I.O.X. 15.

[6] Okla. Stat. Ann. tit. 10, § 1101(1), referenced by respondent, deals not with age at which sexual conduct is proscribed, but with the age at which a person falls under the jurisdiction of juvenile court. In this regard, 16-year olds can be prosecuted as adults if

at petitioner's trial, Ms. Coltman's mother submitted a letter to the military judge which noted that she would have no qualms having the petitioner as a son-in-law. DX. F.

Finally, the petitioner notes, in response to the respondent's waiver argument, that the genesis of the Fifth Amendment lack-of-notice due process and equal protection issues in this case was the Court of Military Appeals decision below. Unlike the case in *Solorio v. United States*, 483 U.S. 435, 451, n.18 (1987), cited by respondent, Brf. at 7, in which this Court declined to consider a claim not raised by Solorio in the Court of Military Appeals, in the case at bar it was the *respondent* who, as a matter of right,[7] appealed and framed the issues addressed by the Court of Military Appeals below.[8] Accordingly, the

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charged with a felony. Similarly, Okla. Stat. Ann. tit. 15, § 13, also referenced by respondent, deals with the ability of persons under 18 to delegate power and to enter into real estate and other types of contracts.

[7] 10 U.S.C.A. § 867(b)(2) (West Supp. 1991) (Article 67(b)(2) of the Uniform Code of Military Justice), requires the Court of Military appeals to review all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review.

[8] The issues framed and certified for mandatory review to the Court of Military Appeals by The Judge Advocate General of the Air Force pursuant to 10 U.S.C.A. § 867(b)(2) (West Supp. 1991):

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT RECOGNIZED A "CONSTITUTIONAL ZONE OF PRIVACY FOR HETEROSEXUAL, NONCOMMERCIAL PRIVATE ACTS OF ORAL SEX BETWEEN CONSENTING ADULTS," THEREBY SETTING ASIDE AN ARTICLE 125 SODOMY CONVICTION.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT HELD THAT THERE MUST BE A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO SUSTAIN A CONVICTION UNDER ARTICLE 125

Fifth Amendment constitutional infirmities which were eventually embedded in the Court of Military Appeals' holding below are properly presented for this Honorable Court's consideration.

Alternatively, this Honorable Court should address these constitutional issues found in the Court of Military Appeals' decision below because of the nature of this case. In addition to the fact, discussed *supra*, that it was the respondent who appealed and framed the issues for mandatory review by the Court of Military Appeals, the petitioner is keenly aware of this Court's jurisdiction to decide issues not presented below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). *See also Youakim v. Miller*, 425 U.S. 231 (1976). Moreover, the complained-of issues were presented in the petition for certiorari, and were addressed by the Brief in Opposition,[9] so there is no danger of appellate surprise or eroding the "integrity of the process of certiorari," *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992). Finally, the Fifth Amendment due process and equal protection concerns were squarely raised by the Court of Military Appeals' decision both in the instant case, as well as in the petitioner's companion case *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) cited extensively by the Court of Military Appeals. *Fagg*, 34 M.J. at 179-80. These issues concern all service members, both male and female, married and unmarried. Furthermore, because service member petitions for writ of certiorari to this Honorable Court are

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FOR A PRIVATE, HETEROSEXUAL, NON COMMERICAL, CONSENSUAL ADULT ORAL SEX ACT.

Fagg, 34 M.J. at 179.

[9] This case is thus distinguishable from *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992), which was cited by respondent. Brf. at 7. *Taylor* dealt with an attorney who raised an argument "for the first time in his opening brief on the merits," after certiorari was granted. 112 S. Ct. at 1649.

contingent on discretionary grants of review by this Court of Appeals,[10] it is extremely unlikely that these constitutional issues will ever again be presented for review by this Honorable Court.[11]

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[10] 10 U.S.C.A. § 867a (West Supp. 1991); 28 U.S.C.A. § 1259 (West Supp. 1991).

[11] Petitioner stands by his Petition for Writ of Certiorari with regard to the respondent's substantive argument on the Fifth Amendment's notice and equal protection issues. Nevertheless, Petitioner would specifically note his strong exception with the respondent's assertion that the petitioner "had adequate notice that his conduct could be punished under the UCMJ." It is difficult to assume, in light of the dearth of prosecutions of other service members similarly situated, that the petitioner would have known that his conduct was criminalized. As highlighted by the Air Force Court of Military Review, "in the many Article 125 prosecutions that this Court has reviewed, none has resulted from a fact situation as unaggravated as the appellant's. *Fagg*, 33 M.J. at 621. Moreover, as illustrated by the Navy-Marine Corps Appellate Defense Division's *amicus*, there exists serious doubt as to whether heterosexual oral sex acts even fall within the ambit of Article 125's criminal prohibitions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Honorable Court should grant the writ.

Respectfully submitted,

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